IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.2424 OF 2005

Smt Arati Shyam Sugandh ...Appellant
Vs.
Konark Vistar & Ors. ...Respondents

Mr Ameya Tamhane for the Appellant.
Mr Sachin Dhakephalkar for the Respondent No.3.
Mr P.J. Thorat i/by Mr R.A. Thorat for the Respondent No.4.

CORAM : A. S. OKA, J.
DATE : MARCH 08, 2006.

P.C.:

1. Heard learned Advocate appearing for the Appellant, the learned Advocate appearing for the Respondent No.3 and the learned Advocate for the Respondent No.4.

2. The Appellant is the original plaintiff. The Appellant-Plaintiff filed a civil suit essentially against the Respondent Nos.1 to 3 for recovery of sum of Rs.05,50,000/- together within interest thereon at the rate of 24 per cent per annum. The case of the Appellant -Plaintiff is that the Respondent Nos.2 and 3 who are the original Defendant Nos.2 and 3 are the partners of the Respondent No.1-Defendant No.1 -Firm. According to the case of the Appellant-Plaintiff the Respondent Nos.1 to 3 agreed to sell two flats in a building which was being constructed by the said Respondents. The Appellant paid sum of Rs.05,50,000/-

to the Respondent Nos.1 to 3 towards the consideration of the flat. According to the case of the Appellant-Plaintiff, Respondent Nos.2 and 3 later on informed the Appellant that the two flats have been sold by them to a third party. The Respondent Nos.1 to 3 handed over a cheque in favour of the Appellant in sum of Rs.05,50,000/- being the refund of the amount paid by the Appellant. The said cheque was dishonoured and therefore, the present suit was filed.

3. An Application was made by the Appellant-Plaintiff under Order 38 Rule 5 of the Code of Civil Procedure, 1908 for attachment of the properties of the Respondent Nos.2 and 3. On the said Application order of ad-interim injunction was passed. The Respondent No.4 claimed to have purchased the property in respect of which attachment was sought. The property subject matter of attachment was a flat in a Co-operative Housing Society. Therefore, the Appellant impleaded the Respondent No.4 and Chairman of the Co-operative Housing Society as parties.

4. The learned Trial Judge by passing impugned Judgment and Decree fully decreed the suit filed by the Appellant and directed the Respondent Nos.1 to 3 to jointly and severally pay sum of Rs.05,50,000/- to the Appellant with interest at the rate of 12 per cent

per annum from the date of filing of the suit until realisation. The learned Trial Judge dismissed the suit as against the Respondent Nos.4 and 5. The only grievance made in this memorandum of Appeal is as regards that part of the decree by which the suit filed by the Appellant was dismissed as against the Respondent Nos.4 and 5 (Defendant Nos.4 and 5). There is no other grievance made in this Appeal as regards the decree passed by the Trial Court.

5. The learned Advocate appearing for the Appellant submitted that the Respondent No.2 purpotedly transferred his property in favour of the Respondent No.4 with the object of defeating the decree which was likely to be passed in the suit. He submitted that the Respondent No.4 could not produce any documents of title. He, therefore, submitted that as the Respondent No.2 is absconding, the suit could not have been dismissed against the Respondent No.4. The learned Advocate appearing for the Respondent No.4 supported the impugned Judgment and Decree.

6. I have considered the submissions. It is not in dispute that even according to the case of the Appellant-Plaintiff only the original Defendant Nos.1 to 3 (Respondent Nos.1 to 3) are liable to pay sum of Rs.05,50,000/- to her alongwith interest. It is not

the case of the Appellant that either the Respondent No.4 or the Respondent No.5 are liable to pay any amount to the Appellant-Plaintiff. It is also not the case of the Appellant-Plaintiff that a charge has been created for payment of the sum of Rs.05,50,000/- on the property of the Respondent No.2 which is claimed by the Respondent No.4. No relief is claimed in the suit in respect of the property allegedly transferred by the Respondent No.2 in favour of the Respondent No.4. In fact in the plaint itself it is stated that the Respondent Nos.1 to 3 are liable to pay the suit claim. No cause of action against the Respondent NOs.4 and 5 has been pleaded in the suit.

7. The only prayer made in the suit is for a money decree in the sum of Rs.05,50,000/- with interest thereof at the rate of 24 per cent per annum. In view of this position, even accepting the averments in the plaint as correct, no decree as prayed by the Appellant in his suit can be passed for payment of money against the Respondent Nos.4 and 5. Hence, there is absolutely no merit in the Appeal preferred by the Appellant-Plaintiff.

8. So far as the property of the Respondent Nos.1 to 3 is concerned, the Appellant can always take appropriate steps in the execution proceedings. It is

pertinent to note that even while passing the impugned Judgment and Decree and dismissing the suit as against the Respondent Nos.4 and 5, the Trial Court has not adjudicated upon the alleged right claimed by the Respondent No.4 in respect of the property sought to be attached at the instance of the Appellant during the pendency of the suit. In any event dismissal of the suit against the Respondent Nos.4 and 5 cannot be construed as any decision by the Trial Court on the alleged right, title and interest claimed by the Respondent No.4.

9. Subject to what is stated above, the Appeal is dismissed.

JUDGE